No. 14705

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
Appellant,

vs.

BRADLEY MINING COMPANY,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court For the District of Idaho, Southern Division

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ARGUMENT

We desire to reply to Bradley's brief. If Bradley's position is sustained, United has no remedy. What does this case involve? We have a contract by which United transferred properties of great value to Bradley. What was United to receive under the contract? Payments under the contract were to be determined in one of three methods, namely: "net mint returns," "net smelter returns," or "net revenue" as defined in the contract.

Obviously "net mint returns" do not apply to this situation.

The lower court stated in its opinion with reference to "net smelter returns":

> "I have been able to find no provision, certainly no adequate provision such as one would expect to find in an arrangement involving operations of such magnitude and importance as we have here, prescribing the method of computing the royalty in event the Company should install and operate a smelter of its own upon the property. * * * But we are still faced with a situation where the contract does not reflect any precise basis for computing the royalty under the circumstances now existing."

This in substance eliminates both "net mint returns" and "net smelter returns" and leaves only one method under the contract to compute royalties. The lower court in discussing "net revenue" stated:

> "In my opinion certain language in the definition of the term 'net smelter returns' precludes the existence of such an understanding (that royalties would be computed under the net revenue clause) even though the language is vague when read in the light of the practice."

The lower court did not point out what language in the definition of the term "net smelter returns" precluded the application of "net revenues" as the

basis for computing royalties and we see no language which precludes such interpretation. In fact, the net revenue clause precisely by definition covers the present situation.

It is our position that Bradley erected the smelter on the property which United deeded to it as its own unilateral act, under which United had no control and that United should not be charged with the costs of operation, salaries and other costs of such smelter before computing royalties. United does not believe that Bradley can deal with itself, it cannot buy its own product and stay within the terms of the contract.

The lower court in its memorandum decision of October 10, 1952, has indicated that a quantum meruit theory should be adopted for smelter costs. With this we do not agree. This would constitute the making of a new contract and inevitably lead to a multiplicity of suits.

In its complaint United simply asks this question:

(1) A determination of the contract and what it meant with respect to the payment of royalties, and

(2) An accounting to determine if Bradley had fully accounted to United for all moneys which may be due United. The decision of the lower court does not give a determination of either point.

There is another factor in this case which needs to be determined and that is the retention by Bradley in inventory of approximately two million pounds of oxide (R. 171) which remain unsold and in its possession at this time and in which United cer-

tainly has some interest. Upon what basis or formula did the court find the determination of United's royalties or interest in this "unsold product"? We do not believe that a reading of the contract allows Bradley to buy its own ore, concentrates or metals and to compute royalties on such basis. Royalties are to be computed on *amounts received* by and *amounts paid* to Bradley.

Counsel for Bradley makes a great-to-do about the equities of the situation. Let us look at the true equities. Property of tremendous value was transferred to Bradley in consideration of certain royalty payments. Nothing was said about the erection of a smelter by Bradley. Nothing was said about the erection of a concentrator mill or other reduction works. There is nothing in the record that United at any time consented either actively or constructively in the erection of the smelter. It was a matter beyond the province of United. United relies on its contract and the terms and conditions of that contract and to destroy this contract would have the effect of leaving valuable property in the hands of Bradley and with no accounting available to United.

This matter is before the court on a summary dismissal without United having its full day in court and it has been deprived of the exercise of due process of law in that there has been an abridgement of its contract and no accounting thereunder on any theory. We cannot believe that United should be required to come into court at the end of every accounting period and sue on a quantum meruit basis to

determine what it has coming by way of royalties.

It is United's contention that it should have an interpretation of the contract by this court as prayed in the complaint and after such interpretation the matter be referred to the lower court for an accounting in harmony with the court's opinion.

The order of the lower court in dismissing the action stated in part:

> "Plaintiff is not entitled to have an accounting from the defendant, based upon the net revenue provision of said contract but only, if at all, upon the net smelter returns provision of said contract."

This leaves United in the position of not being entitled to an accounting apparently for any reason and United is in no position to protect itself against self-serving accounting statements which might be furnished by Bradley.

United believes that the "net revenue" clause is applicable wherein it is stated:

> "By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho."

United should not be required in the face of the foregoing provision of the contract to rely upon quantum meruit or any other basis than that contained in the contract between the parties as a basis for determining its royalties.

We, therefore, respectfully request the court that the decision of the lower court be reversed and that this court construe the contract and that the lower court be ordered to make such accounting as is contemplated by the terms of the contract.

Respectfully submitted,

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No. 14,705

In the

United States Court of Appeals

For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
a corporation,

Appellant,

vs.

BRADLEY MINING COMPANY,
a corporation,

Appellee.

Petition of Appellee for Rehearing and Motion for Modification Under Fountain v. Filson, 336 U.S. 681.

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SUBJECT INDEX

INDEX OF AUTHORITIES

CASES — Pages

STATUTES AND RULES

TEXTS AND MISCELLANEOUS

No. 14,705

In the

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UNITED MERCURY MINES COMPANY,
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Petition of Appellee for Rehearing and Motion for Modification Under Fountain v. Filson, 336 U.S. 681.

The appellee, BRADLEY MINING COMPANY, respectfully petitions for a rehearing and, alternatively, moves for a modification of this Court's decision of February 8, 1956.[1] The decision goes farther than appellant sought in its Specifications of Error and farther than we believe the Court could have meant to go or may properly go.

1. Time to file this petition was extended by an order of March 2, 1956.
All emphasis in quotations has been added.

NATURE OF THIS COURT'S DECISION

Before enumerating the grounds for rehearing and modification, a brief resume of the nature of this Court's decision is desirable.

This case turns on the construction of a written contract. What the District Court did was to enter a *summary judgment* for defendant—the appellee—by construing the contract on its face alone and without reference to or the aid of any *extrinsic evidence.* On *that* construction plaintiff—the appellant—conceded that it had no money claim (R. 213, 215, 218), and consequently the complaint was dismissed (R. 189).[2]

This Court's decision holds that the contract does not on its face bear the construction which Judge Healy, sitting as the District Judge, gave it. *If* by reference to its text alone the contract cannot be given that construction, then reversal must indeed follow. **But this Court's decision goes beyond a reversal.** Reaching a different construction than did the District Court, *it then fastens that construction on the contract* and remands the case, *so fettered,* for proceedings merely to determine the amount of money due.

That is to say, **this Court's decision reverses a summary judgment for defendant but then turns around and directs a summary judgment for plaintiff.** Thereby it denies appellee the right to a trial on the major issue of the case, namely, the construction of the contract.

And this summary termination of the important issue of the case has taken place although appellant did not seek a summary

2. In the District Court appellee first moved for summary judgment (R. 51) and it was denied (R. 136). After other proceedings the case came on for a pre-trial conference (R. 188). One of the purposes of a pre-trial conference is to render a partial summary judgment, if warranted, *Griffeth v. Utah Power & Light Co.,* 226 F.2d 661, 670 (9 Cir.). At that conference the District Court announced the construction of the contract reached by it as an "issue of law" (R. 205, 215, 221), i.e., on the face of the written contract alone. The court then held there "is no genuine issue as to any material fact" (R. 190). Its judgment was thus a summary judgment (R.C.P. Rule 56).

construction of the contract in either the District Court or this Court. Appellant did not move for a summary judgment in the District Court. And its grievance on appeal was that the District Court should have let the case be tried on the "main issue of interpretation of the contract".[3] Appellant summed up the burden of its grievance in these words:

> "Assignments of Error numbered I, II, III, IV, V and VII may be condensed in the following restatement * * *. It was error to enter a judgment of dismissal without interpreting the contract *either as contended by United or as contended by Bradley after having entered findings of fact"*, i.e., for or against it but after a trial (Brief of Appellant, p. 12.)[4]

GROUNDS FOR REHEARING OR MODIFICATION

The grounds we submit for a rehearing may be summed up in one statement—that the action of this Court in going beyond a mere reversal and remand is erroneous. The reason for this statement may be summarized thus:

1. If the contract does not on its face clearly bear the construction given it by the District Court, then under the applicable State law (controlling under *Erie R. Co. v. Tompkins,* 304 U.S. 64), it is sufficiently ambiguous so as to permit the introduction of extrinsic evidence as an instrument of construction.
2. Under the law of California and Idaho, upon the slightest ambiguity in a contract, extrinsic evidence is admissible in aid of its construction.
3. When extrinsic evidence is admissible, the construction is a question of fact, the case must be tried, a summary judgment construing the document is not permissible,

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3. Appellant's Statement of Points, No. III, R. 222.

4. Its complaint was that the court erred "by dismissing the action without a trial when genuine issues of fact were pending" (Br. p. 18). See also Brief of Appellant, pp. 13, 20.

and the fact that one party moved for a summary judgment does not justify entry of summary judgment against it.

4. Particularly, in such a case, an appellate court may not construe the contract. In going beyond a mere reversal and remand for an unfettered trial, and in summarily construing the contract, the Court's decision conflicts with *Fountain v. Filson,* 336 U.S. 681.
5. Consequently, if the judgment of the District Court is to be reversed, the case should be remanded for a trial to determine the actual intent of the parties in making the contract and to this end to receive evidence of the customs, usages and practices of the mining and metallurgical industries, the background and circumstances in which the contract was made, the contemporaneous conduct of the parties under it, and other extrinsic circumstances, some of which we shall describe.

MOTION FOR MODIFICATION OF ORDER

In *Fountain v. Filson,* supra, discussed at pages 16-20 below, the Supreme Court, in reversing a Court of Appeals in a situation identical to the one here presented, noted that appellee-defendant made a "timely motion for a modification of this order [of the Court of Appeals] in order to permit a trial as to the existence of the" obligation (336 U.S. at 682). We therefore attach to this petition a formal motion to that effect.

DISCUSSION

At the threshold it will serve clarity to state succinctly the ultimate issue in this case.

Prior to 1941 appellant owned certain mining claims in Idaho, which appellee had been mining ever since 1927 under a succession of royalty agreements. In 1941 appellee bought these

properties from appellant and by written agreement promised to pay, as the consideration, five per cent (5%) for 999 years

> "on all net smelter returns, net revenue, and net mint returns, as defined herein, upon and for all minerals, ores, metals or values, of any and every kind and character, mined, extracted or taken from the above described mining claims, or any part thereof, or from any lands, grounds or claims, lodes or deposits, within the exterior boundaries of said groups of claims * * *" (R. 15)

Prior to 1949 appellee owned no smelter but shipped and sold the concentrates from the properties to smelters owned by others and paid appellant 5% of the proceeds. There is no question as to the correctness of these payments.

In 1949 appellee built its own smelter on the premises, called the "Yellow Pine smelter". Smelting, as we note at page 26 infra, is a wholly different business from mining and the miner's ordinary treatment processes.

The Precise Issue of Construction of the Contract

This Court's opinion states that

> "it is not conceivable that the parties intended that United would be deprived of all royalties by the simple device of Bradley building its own smelter near its mines." (Op. p. 3)

We agree. But this misconceives the issue. No one has *ever* contended that by building its own smelter appellee would escape paying royalties. Indeed, appellee has already paid royalties in six figures on material going through that smelter. *The question is entirely different.* It is not whether appellant shall cease to get anything because appellee erected its own smelter but whether appellant is to get considerably *more* than it otherwise would.

Suppose the Yellow Pine smelter had been erected and was owned and operated by John Doe, a third party. Appellant's 5% would then be calculated after deduction of the smelter charges.

Or suppose that appellee were to sell the Yellow Pine smelter to John Doe who should thereafter operate it. Appellant's 5% would then also be calculated **after deduction of the smelter charges.**

Or suppose that tomorrow fire and flood were to destroy the Yellow Pine smelter so that concentrates again had to be sent to another's smelter. Appellant's 5%, as before the erection of the Yellow Pine smelter, would be calculated **after deduction of smelter charges** (and also after deduction of transportation charges as well).

But just because appellee owns the smelter (which it built at a cost to itself of $2,000,000) appellant claims that its 5% should be calculated *without first deducting smelter charges.* The alternatives presented are not whether, on appellee's contention, appellant should now get nothing on local concentrates passing through the Yellow Pine smelter or, on appellant's contention, that it get the same as if the smelter were "independently owned." **The alternatives are whether, on appellee's contention, appellant shall get the same and, upon appellant's contention, that it get considerably more than if the smelter were independently owned.**[5]

Under appellee's construction appellant has been paid in full (R. 213). This Court's decision summarily adopts appellant's construction, which almost doubles the royalties. From the opening of the smelter in 1949 to the dismissal below, this construction imposes an added burden of in excess of $100,000. Even assuming only 25 years of operations in the remaining 984 years of the contract term, the issue involves $1,000,000.

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5. This actually overstates the issue in appellant's favor. Independent smelters will pay little or nothing for silver or gold content in antimony concentrates and are not efficient enough to beneficiate some of the low content ore from the Bradley properties (Cf. allegations of answer, R. 46, and Affidavit, R. 59-61). Thus appellant will in any event have a greater return because appellee operates its own smelter. The question is whether, in addition, the share of smelting costs which otherwise would be borne by appellant are now to be saddled on appellee.

The Issue Now Presented to This Court

But the issue we ask this Court to consider on this petition and motion is not the ultimate answer to the foregoing question of construction but the principles by which it must be answered, the proper tribunal to answer it, and the proper procedure by which it is to be answered.

In *Fountain v. Filson,* 336 U.S. 681, petitioner submitted in its petition for certiorari that the Supreme Court should

> "unmistakably inform bench and bar whether a litigant may resort to Rule 56 only if willing to gamble against losing all chance of trial should the appropriate Court of Appeals decide that his legal theory is not controlling".

Certiorari was granted, and the Supreme Court answered that such a litigant was still guaranteed his right to a trial. Here the question is even starker:

> When, at the pre-trial conference, Judge Healy announced that he was prepared to decide the construction of the contract as a question of law and to dismiss if plaintiff had no evidence of damages under that construction, was defendant obliged to reject the court's offer to decide in its favor and to insist on a trial in order to avoid losing all chance of trial should this Court of Appeals thereafter hold that Judge Healy erred?

Order of Discussion

In part IV of the discussion to follow we shall show that, if the District Court erred in construing the contract on its face in appellee's favor, then extrinsic evidence is necessary. We there note that this Court's opinion itself relies on extrinsic circumstances and we array the available extrinsic evidence, offer to prove it at a trial if given a chance, and show its bearing on the case. But first, in parts I, II and III, we discuss the consequences.

I.

Upon the Slightest Ambiguity in a Contract, Extrinsic Evidence Is Admissible in Aid of Construction.

Under *Erie R. Co. v. Tompkins,* 304 U.S. 64, the interpretation of the contract" must be decided according to state law. *Transcontinental Air v. Koppal,* 345 U.S. 653, 656.[6]

This contract was entered into between an Idaho and a California corporation (R. 3). Depending on whether the latest signature was in California or Idaho, it is a California or Idaho contract. But it is immaterial which, for the law of the two states on construction of contracts is the same, and, as the Court knows, Idaho decisions pattern themselves on California law. Since the California cases on this subject are among the most articulate in the nation, the matter may be lucidly stated by quoting from them.[7]

In *Body-Steffner Co. v. Flotill Products,* 63 C.A. 2d 555, 147 P.2d 84, which amasses the authorities on the subject and in turn is approved in *Union Oil Co. v. Union Sugar Co.,* 31 Cal. 2d 300, 188 P.2d 470, the court succinctly stated two principles:

First (p. 558):

> "It is a rule of practically universal acceptation in common law jurisdictions that however clear and unambiguous the

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6. This Court had previously so held in *William S. Gray & Co. v. Western Borax Co.,* 99 F.2d 239, 242 (9 Cir., per Denman, C. J.). Accord: *Edward B. Marks Music Corporation v. Foullon,* 171 F.2d 905, 908 (2 Cir.).

7. For pertinent Idaho decisions see *Haener v. Albro,* 73 Ida. 250, 249 P.2d 919, 925 (1952); *Williams v. Idaho Potato Starch Co.,* 73 Ida. 13, 245 P.2d 1045 (1952); *Stone v. Bradshaw,* 64 Ida. 152, 128 P.2d 844 (1944); *Twin Falls Orchard & Fruit Co. v. Salsbury,* 20 Ida. 110, 117 Pac. 118, 122 (1911); *Molyneux v. Twin Falls Canal Co.,* 54 Ida. 619, 35 P.2d 651, 654; *Wood River Power Co. v. Arkoosh,* 37 Ida. 348, 215 Pac. 975, 976, 977; *Caldwell State Bank v. First Nat. Bank,* 49 Ida. 110, 286 Pac. 360; *Johansen v. Looney,* 30 Ida. 123, 163 Pac. 303 (1913).

In *Williams v. Idaho Potato Starch Co.,* supra, a contract called for "a ten inch pump". As the court said, this language was "clear on its face" but extrinsic evidence, if admitted, would show it to be in fact ambiguous:—"Upon the admission of this testimony, an ambiguity arises." The court held the evidence admissible, and held further that "evidence of prior and contemporaneous negotiations" was admissible to remove the ambiguity.

words of a particular contract may appear on its face it is always open to the parties to the contract to prove that by the general and accepted usage of the trade or business in which both parties are engaged and to which the contract applies the words have acquired a meaning different from their ordinary and popular sense."[8]

Second, as respects "introduction of evidence, apart from evidence of trade usage" (p. 561-562):

"Where no extrinsic evidence is offered courts are too frequently compelled to construe ambiguities and to reconcile inconsistencies by a consideration of the contracts on their face; but where extrinsic evidence is offered to explain inconsistent provisions in a contract *courts should not strain to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists.* 'The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that when *any* doubt arises upon the true sense and meaning of the words themselves, or *any* difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself.' "

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8. The court here cited Civil Code, Sec. 1644; Code Civ. Proc., Sec. 1861; Rest., Contracts, Sec. 246(a); 2 Williston on Sales, 2d ed., Sec. 618, p. 1556; 3 Williston on Contracts, rev. ed., Sec. 648, pp. 1871-2, Sec. 650, pp. 1874-9; 9 Wigmore on Evidence, 3d ed., Sec. 2463, p. 204; 25 C.J.S., Customs and Usages, Sec. 24, pp. 111-2, 17 C.J., Id., Sec. 61, pp. 498-9; 12 Am. Jur. Contracts, Sec. 237, pp. 762-3; note 89 A.L.R. p. 1228, et seq.

The Restatement of Contracts, Section 246(a), comment, states "The rule * * * is not confined to unfamiliar words or to words often used ambiguously. Familiar words may have different meanings in different places. A usage may show that the meaning of a written contract is different from an apparently clear meaning which the writing would otherwise bear."

This Court has ruled the same way, even in the days before *Erie v. Tompkins* established that state law must be followed on non-federal questions. Thus, in *Consolidated Coppermines Corp. v. Nevada C. Copper Co.,* 64 F.2d 440 (adopting opinion in 44 F.2d 192, cer. den. 290 U.S. 664), a mining case like the present, on the basis of extrinsic evidence this Court affirmed a judgment construing contract words, "all of the ore", to mean only all underground ore and not shovel-mined ore; i.e., that it did not in fact mean "*all* the ore".

The United States Supreme Court has long held that resort may always be had to the circumstances in which the contract was made. *Lowrey v. Hawaii,* 206 U.S. 206, 218, 219-222; *United States v. Bethlehem Steel Co.,* 205 U.S. 105, 117-118; *Harten v. Loffler,* 212 U.S. 397, 404.

In fact, there is a great body of outstanding authority that extrinsic evidence is always admissible whether a contract is ambiguous on its face or not. *United States v. Bethlehem Steel Co.,* supra, is noted in *United States v. Lennox Metal Manufacturing Co.,* 225 F.2d 302 (2 Cir. 1955), as so holding, as are California decisions, Corbin on Contracts and 9 Wigmore on Evidence (3rd ed.), Sec. 2461, et seq.[9] Thus Professor Corbin, in the latest and

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9. The *Lennox* case states:

"The 'ambiguity-on-its-face' rule is a vestigial remain of a notion prevailing in 'primitive law' * * * [310]

"Even if a word in a written agreement is not ambiguous on its face, the better authorities hold that its context, its 'environment,' must be taken into account in deciding what the parties mutually had in mind when they used that verbal symbol.

"The problem of interpreting a contract is, of course, that of understanding the communication between the parties * * * [310] Judge Learned Hand has sagely warned that, in attempting a solution, it is 'one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary * * *' [311] * * * '[T]he law requires the court to put itself as nearly as possible, in the position of the parties, with their knowledge and their ignorance, with their language and their usage. It is the meaning * * * of the parties, thus determined, that must

most thorough treatise on the subject, inquires whether "words [are] ever so 'plain and clear' as to exclude proof of surrounding circumstances and other extrinsic aids to interpretation" and doubts that they are (3 Corbin on Contracts, Sec. 542, p. 66). He states that cases so holding "should be subjected to constant attack and disapproval" because "it is easy to jump to a conclusion" (3 Corbin p. 71).

But without going so far, the courts almost universally agree, in the language of the *Body-Steffner* case, that if there is the least sign of ambiguity, then extrinsic evidence should be admitted and that the court should not strain to find absence of ambiguity. Thus in *United States v. Lennox Manufacturing Co.,* 225 F.2d 302 (2 Cir. 1955), it is said:

> "* * * even those courts which still say ambiguity is a necessary condition of considering such extrinsic evidence are quick to find such ambiguity, on slight grounds, when the extrinsic evidence is convincing" (313).

In *Barham v. Barham,* 33 Cal. 2d 416, 202 P.2d 289, the Supreme Court of California sums up the rules of interpretation:

> "Where *any doubt* exists as to the purport of the parties' dealings as expressed in the wording of their contract, the

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be given legal effect.' "

In *Body-Steffner Co. v. Flotill Products,* 63 C.A. 2d 555, 562, 147 P.2d 84, the court similarly said:

"There is a considerable body of opinion among students of the subject whose conclusions are entitled to the greatest respect that parol evidence should always be admissible to show the sense in which the contracting parties used and understood the language of their written contracts."

See also *Wells v. Wells,* 74 C.A. 2d 449, 169 Pac. 2d 23 and *Union Oil Co. v. Union Sugar Co.,* 31 Cal. 2d 300, 306, 188 Pac. 2d 470, which cites, in support of the view that "extrinsic evidence is generally admissible to show the sense in which the parties used language embodied in the contract, whether or not the words appear ambiguous to the reader", *Universal Sales Corp. v. California etc. Mfg. Co.,* 20 Cal. 2d 751, 776, 128 P.2d 665; Rest. Contracts, § 242, comment a; Holmes, *The Theory of Legal Interpretation,* 12 Harv. L. Rev. 417, 420; 9 Wigmore on Evidence (3d ed.) §§ 2458-2478; McBaine, *The Rule Against Disturbing Plain Meaning of Writings,* 31 Cal. L. Rev. 145.

court may look to the circumstances surrounding its execution —including the object, nature and subject matter of the agreement [citation]—as well as to subsequent acts or declarations of the parties 'shedding light upon the question of their mutual intention at the time of contracting' [citation]."[10]

II.

Where Extrinsic Evidence Is Admissible in Aid of Construction of a Contract, a Summary Judgment Is Not Permissible, and the Case Must Be Tried.

When extrinsic evidence is admissible, construction cannot be disposed of by summary judgment or by reference to affidavits. As said in 6 Moore's Federal Practice (2d ed.) Sec. 56.17(43):

> "* * * where the contract is ambiguous and there is a genuine factual issue as to its meaning, summary judgment should be denied."

In *Boro Hall Corp. v. General Motors Corp.,* 164 F.2d 770, 771, 772 (2 Cir.) the court, noting that extrinsic evidence was admissible to interpret the contract before it, said:

> "Plaintiff was therefore entitled to a trial at which it might offer evidence—including the testimony of its own officers and of defendant's officers or other employees—in aid of an interpretation * * *"

In *Dale v. Preg,* 204 F 2d 434, 435 (9 Cir.) this Court summed up the principle:

> "By their amended answer appellants placed in issue the meaning of the agreement. The principal question on this

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10. Compare the recent decision of the Court of Claims in *Blackburn v. United States,* 116 F. Supp. 584, 586 (1953) where a summary judgment was denied, the court saying:

> "The language inserted in the contract is by no means so clear, *if language ever is so clear,* as to make inadmissible evidence as to what the parties to the contract intended it to mean. That intention, if it is mutual, is the essence of any contract, and the parties to it are privileged to use whatever form of shorthand, code, trade, ungrammatical, or other expression they may hit upon. They may make trouble for themselves and for a court by their unorthodox expression, but they do not forfeit their rights."

> appeal is whether this was an issue of fact. If it was, it was error to grant summary judgment. * * * If * * * the contract can be said to be obscure or ambiguous in its terms, as appellants contend, then its meaning was a question of fact and extrinsic evidence should have been received in aid of its interpretation."

In *Detsch & Co. v. American Products Co.*, 152 F.2d 473 (9 Cir.), this Court (per Denman, C.J.) reversed a summary judgment because extrinsic evidence might be pertinent to the interpretation of the contract.

In *Farrand Optical Co. v. United States,* 107 F. Supp. 93, 96 (S.D. N.Y.):

> "* * * where a contract is ambiguous and parol evidence is relevant and material to the issue of construction, a question of fact is presented. Rolle Mfg. Co. v. Marco Chemicals Inc., D.C., 92 F. Supp. 218. A trial then should be had where the parties may offer relevant evidence on the issue."

And in the *Rolle* case, here cited, the court observed:

> "The parties must therefore be afforded the opportunity to offer proof, not by affidavit but on a trial of the action.
>
> "* * * Where the contract is ambiguous and parol evidence is relevant and material to the issue of construction, the construction of the contract is a question of fact." (92 F. Supp. at 219, 220).[11]

THE FACT THAT APPELLEE MOVED FOR A SUMMARY JUDGMENT DOES NOT JUSTIFY THE ENTRY OF A SUMMARY JUDGMENT AGAINST IT.

We anticipate the argument that appellee opened itself to a summary judgment against it by moving for one against appellant. Such a contention would have no merit.

Appellant did not itself move for summary judgment. Appellee was never warned or apprised that if it should be held that the

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11. Accord: *Golden v. Popper Shoe Corporation,* 94 F. Supp. 100 (D. Mass.).

contract did not unambiguously mean what appellee contends, then its adversary would ask for an opposite summary construction as a matter of law and without evidence. Had it been so apprised, appellee could and would have pointed to numerous relevant extrinsic circumstances of which it would offer evidence, and which would entitle it to a trial of the meaning of the contract as an issue of fact.

Courts have disagreed whether, if one party moves for a summary judgment, the District Court can grant a summary judgment in favor of the other who has not so moved. In *Fountain v. Filson*, 336 U.S. 681, the Supreme Court avoided that question.[12] But obviously the situation where appellant had not moved for a summary judgment is no better than if he had. In *Hycon Manufacturing Company v. H. Koch & Sons*, 219 F.2d 353 (9 Cir. 1955) this Court held, and in *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780, 784 (2 Cir.), cer. den. 328 U.S. 870, the court said:

> "It does not follow that, merely because each side moves for a summary judgment, there is no issue of material fact. For, although a defendant may, on his own motion, assert that, *accepting his legal theory,* the facts are undisputed, he may be able and *should always be allowed to show* that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists."[13]

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12. See discussion, 6 Moore's Fed. Prac. (2d ed.) § 56.12, p. 2088. In *Fountain v. Filson*, supra, the Supreme Court said:

> "We need not pass on the propriety of an order for summary judgment by a district court in favor of one party after the opposite party has moved for a summary judgment * * *." (p. 682-683)

The Supreme Court's Advisory Committee on Rules for Civil Procedure seeks to settle this question by a proposed amendment to Rule 56. See "Report on Proposed Amendments to the Rules of Civil Procedure for the United States District Courts," (October 1955, Government Printing Office) p. 57, comment under proposed amendment to Rule 56.

13. Followed and quoted in *Krug v. Santa Fe Pac. R. Co.*, 158 F.2d 317 (D.C. Cir.) and in *Garrett Biblical Institute v. American University*, 163 F.2d 265, 266 (D.C. Cir.).

Or, as said by this Court in the *Hycon* case, there may be "postulates of fact involved in the diametrically opposite positions of the respective litigants" and "both contentions of fact could not be true."

The *Hycon* case cites *Begnaud v. White,* 170 F.2d 323 (6 Cir.), where the court said (p. 327):

> "The fact that both parties make motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the Court to rule that no fact issue exists. Each, in support of his own motion, may be willing to concede certain contentions of his opponent, which concession, however, is only for the purpose of the pending motion. If the motion is overruled, the concession is no longer effective. Appellants' concession that no genuine issue of fact existed was made in support of its own motion for summary judgment. We do not think that the concession continues over into the Court's separate consideration of appellee's motion for summary judgment in his behalf after appellants' motion was overruled."

And see, generally, 6 Moore's Fed. Practice, pp. 2089, 2092, et seq. As Moore states (p. 2089):

> "Care should, of course, be taken by the district court to determine that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried * * *."

Under R.C.P. Rule 12(b) a case cannot be disposed of as on motion for summary judgment unless the party against whom it is to be issued has been apprised by court or counsel that such relief is sought, so that he has full opportunity to make a showing to meet it, and thus protect his right to a trial.

This brings us to the question of this Court's power and function.

III.

It Follows That an Appellate Court May Not Construe the Contract and Certainly Cannot Do So Before a Trial. Here Fountain v. Filson, 336 U.S. 681.

From the principles limiting a trial court's power to construe a contract summarily, it follows, *a fortiori,* that an appellate court, in reversing a summary judgment rendered *for* appellee should not direct entry of a summary judgment *against* appellee. Here appellee, by its motion for a summary judgment, contended that the contract on its face unambiguously possessed the construction *it* advocated. It did not thereby concede or stipulate that should a court disagree with it, the contract could then be construed on its face alone. The District Court agreed with appellee's legal theory. But when this Court disagreed, it does not follow that appellee may be deprived of *the right to a trial and the opportunity of offering extrinsic evidence by documentary and oral testimony that would substantiate its construction or negative any other construction.*

Up to the moment this Court concluded that the judgment of the District Court should be reversed, its considerations were necessarily governed by the principle that all doubts had to be resolved against the party who had obtained the summary judgment, i.e., appellee. *Griffeth v. Utah Power & Light Co.,* 226 F.2d 661, 669 (9 Cir.). But on the instant it concluded to reverse, and then proceeded *ex mero motu* to the question whether it should direct a summary construction *against* appellee, the field was reversed and it became necessary to resolve all doubts about the existence of an issue of fact in favor of appellee, and particularly so since the question thus became whether to order a summary judgment for one who had not moved for it, against one who had had no opportunity to oppose it, and on an incomplete record.

In *Fountain v. Filson,* 336 U.S. 681, on appeal from a summary judgment for a defendant, the Court of Appeals remanded the

case to the district court with directions to enter a money judgment for plaintiff, just as here this Court's decision leaves open a trial only to determine the amount of money due. In reaching its decision the Court of Appeals examined depositions *just as here this Court,* at its opinion shows, *examined and relied on affidavits* submitted by appellee. (See discussion p. 21, infra). The Supreme Court granted certiorari and in the same order, without further briefs or argument, reversed, saying:

> "In *Globe Liquor Co. v. San Roman,* 332 U.S. 571 (1948), and *Cone v. West Virginia Paper Co.,* 330 U.S. 212 (1947), we held that judgment notwithstanding the verdict could not be given in the Court of Appeals in favor of a party who had lost in the trial court and who had not there moved for such relief. *One of the reasons for so holding was that otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case.* He would have had such an opportunity if a proper motion had been made by his opponent in the trial court. *The same principle interdicts, a fortiori, the appellate court order for summary judgment here.* Summary judgment may be given, under Rule 56, *only if there is no dispute as to any material fact.* * * * When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her."

Discussing this subject, Moore's Federal Practice states (p. 2091) that an appellate court, when reversing summary judgment for one party, *cannot direct a summary judgment for the other unless*

> "it is clear that both sides [had] presented all the facts as though the hearing were a final one * * *. [A] party in whose favor summary judgment is rendered has the burden of establishing that there are no disputed material facts. It does not, therefore, follow that because summary judgment in favor of

> the defendant on the issue of personal liability was erroneous that summary judgment for the plaintiff on that issue is proper. Unless, then, the case is clear, within the qualifications, and limitations just stated, the appellate court should not order summary judgment for the nonmoving party, but *should remand for further development of the case* * * *."

This, says Moore (p. 2095), is true even where the appellant had himself made a motion for summary judgment and had thereby

> "apprised his adversary, who also had moved for summary judgment, that he should be prepared to meet the appellant's position that on the undisputed facts appellant was entitled to judgment as a matter of law."

Even in that situation "the appellate court *should be quite certain* that no further exploration of the facts is in order."

These principles control the present case.

The construction of a contract is primarily the function of the trial court. The function of an appellate court is merely to review that construction, not to act *ab initio*. After the introduction of evidence at a future trial, the District Court will reach a construction. On appeal from *that* judgment, this Court's task could only be to determine whether the evidence adduced, *added* to the face of the contract, was sufficient support for the decision. This Court could not substitute its own view; it could only reverse "if clearly erroneous".

As said by this Court in *Hycon Manufacturing Company v. H. Koch & Sons,* 219 F.2d 353, 355 (9 Cir.),

> "No authority is given except to District Courts to make new findings of fact. Presently our sole function * * * is to re-examine judicially, criticize and set aside if 'clearly erroneous.' The existence of the basis of fact in documentary form or in agreed statement of the parties does not transmute such propositions into questions of law."

In *Arnstein v. Porter,* 154 F.2d 464, 474 (2 Cir.), it was said that one must not

> "convert an appellate court into a trial court. The avowed purpose of those who sponsored the summary judgment practices was to eliminate needless trials * * * In the attempt to apply that reform—to avoid what is alleged to be a needless trial in a trial court—we should not conduct a trial in this court. Where the facts are thus in real dispute, it is our function, after a trial in the lower court, to review its legal conclusions and, with reference to its findings of fact, to determine not whether we would ourselves have made them, but merely whether they rest on sufficient evidence in the record * * * in reviewing a judgment * * * ours must be a limited function. This is not, and must not be, a trial court. Such a court has a duty more difficult and important than ours."

Construction of a contract with the aid of extrinsic evidence is a matter of inferences. Inferences are themselves facts, and a trial court's findings thereon, like any other findings, are controlling unless clearly erroneous. *Walling v. General Industries Co.,* 330 U.S. 545, 550; *Tennant v. Peoria & P. U. Ry. Co.,* 321 U.S. 29, 35. This Court has said that "any attempt on the part of the appellate court to draw an inference of fact [contrary to one not clearly erroneous] constitutes a 'usurpation of the province of the trial court' ". *United States v. Fotopulos,* 180 F.2d 631, 635 (9 Cir.). And see *Estate of Bristol,* 23 Cal. 2d 221, 143 P.2d 689, and *Estate of Rule,* 25 Cal. 2d 1, 152 P.2d 1003, where it is said that an appellate court may not supplant the trial court's interpretation of a contract where extrinsic evidence has been received which permits diverse inferences.

The Supreme Court's Advisory Committee praises this Court's decision in *Quon v. Niagara Fire Ins. Co. of New York,* 190 F.2d 257 (9 Cir.),[14] where it was aptly said:

14. Report of October 1955, p. 53, comment under proposed amendment to Rule 52.

"The writing under these circumstances must be viewed in its setting together with all the other evidence in light of the credibility accorded the witness. Here the writing is one of the collateral facts. * * *"

"Under such circumstances, the use of the cliche that the appellate court is in as good a position as the trial judge to construe a writing is futile. The maxim is not true, as often happens with stereotyped sayings, in this situation. Here the construction entered into a finding of fact which cannot be set aside unless clearly erroneous. *In attributing imperative influence to a writing, courts would be reverting to the authoritarian doctrine of medieval scholasticism.* Wigmore's language made a destructive criticism of this view: '* * * a writing is, of itself alone considered, nothing,—simply nothing. It must take life and efficacy from other facts, to which it owes its birth; and these facts, as its creator, have as great a right to be known and considered as their creature has. * * * There is no magic in the writing itself. It hangs in mid-air, incapable of self-support, until some foundation of other facts has been built for it.' 9 Wigmore on Evidence, 3rd Ed., 5."[15]

The fact that a case is to be court tried instead of jury tried is irrelevant. The same principles apply.[16]

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15. Numerous other decisions of this Court can be cited on the limited function of an appellate court. E.g., *Waialua Agr. Co. v. Maneja,* 178 F.2d 603; *Helbush v. Finkle,* 170 F.2d 41; *Paramount Pest Control Service v. Brewer,* 170 F.2d 553; *Jacuzzi Bros. v. Berkeley Pump Co.,* 191 F.2d 632, 637.

16. As said by the Second Circuit in *Colby v. Klune,* 178 F.2d 872, 874: "Nor is the situation different because the trial will be before a trial judge without a jury. For how can the judge know, previous to trial, from reading paper testimony, what he will think of the testimony if and when, at a trial, he sees and hears the witnesses?"

IV.

Appellee Is Entitled to a Trial in Order to Offer Extrinsic Evidence in Aid of the Construction of the Contract.

We come now to the question whether the contract calls for extrinsic evidence. In answering that question, we need not rely on the principle that one has a right to a trial where "there is *any* doubt as to whether there is a fact issue", *Griffeth v. Utah Power & Light Co.,* 226 F.2d 661, 669 (9 Cir.), or "the slightest doubt", *Gottlieb v. Isenman,* 215 F.2d 184, 186 (1 Cir.), *Doehler Metal Furniture Co. v. United States,* 149 F.2d 130 (2 Cir.)[17].

Here the matter, we submit, is clear.

A. THIS COURT HAS ITSELF GONE OUTSIDE OF THE FACE OF THE CONTRACT INTO AFFIDAVITS FOR EXTRINSIC EVIDENCE TO REACH ITS CONSTRUCTION, THUS DECIDING AN ISSUE OF FACT WITHOUT TRIAL.

This Court has itself resorted to extrinsic circumstances to reach its interpretation. Its opinion states (pp. 1-2):

> "Bradley's mines are situated near Stibnite, Idaho, some 80 miles from the nearest railway station at Cascade. * * * The ores are of a very low grade, consisting principally of antimony and gold. The wagon road from Stibnite to Cascade is over high mountainous territory at points exceeding seven thousand feet in elevation; it is not hard surfaced and due to weather conditions is for considerable periods during the winter months either closed to or unsuitable for use in the transportation of heavy material.
>
> "* * * Bradley erected a concentration plant at Stibnite near the mines. That plant produced bulky concentrates to be carried over the eighty miles of unsurfaced mountain road to the railroad at Cascade."

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17. Or "if the slightest issue of fact is presented", *Metropolitan Life Ins. Co. v. Everett,* 15 F.R.D. 498, 499; or "a reasonable indication that a material fact is in dispute", *Begnaud v. White,* 170 F.2d 323 (6 Cir.).

These facts are not to be found in the pleadings or the contract, but come from an affidavit of John D. Bradley (R. 52 at 59). Yet they are facts which enter into the Court's reasoning, for the opinion states (p. 3):

> "It is obvious that with a vast acreage of deposits contemplating 999 years of mining it was most likely that Bradley would seek to avoid the cost of the long mountainous unsurfaced road haul of its concentrates, by having built or itself building a smelter near the mines."

From what is the fact thought to be "obvious"?—not from the writing itself, but from the fact of a "long mountainous unsurfaced road haul". But that is an **extrinsic circumstance taken from an affidavit.** Again, the Court's opinion asserts of another statement

> "That this is the general method of computing the price paid by smelters also appears from the affidavit of Harold E. Lee, an expert witness."

The reference is to R. 110.

Since extrinsic circumstances are thus to be consulted, *appellee is (1) entitled to a trial where it can bring living witnesses,* rather than be relegated to affidavits,[18] (2) it is entitled to a trial by a trial court rather than a trial by an appellate court, and (3) it is entitled to produce all available extrinsic circumstances and not have the case decided on what happened to be in a record made for other purposes.

As we have seen, the Court cannot decide this case against appellee on the basis of these affidavits, just because they were filed by appellee. Appellant never relied on them in support of *its*

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18. The summary judgment "procedure is not, and of right ought not to be, a substitute for a trial by jury or judge," *Griffeth v. Utah Power & Light Co.,* 226 F.2d 661, 669 (9 Cir.).

construction. On the contrary, appellant *moved to strike these affidavits as inadmissible evidence* (R. 71, 112).

Furthermore, when this Court's opinion rests upon the view that it was "obvious" that Bradley would build a smelter near the mines, it has resolved a question of *credibility*. The record contains an affidavit of appellant's president, Mr. Oberbillig (R. 114) which states (R. 122) that "[p]rior to the execution of the 1941 agreement I was advised by the representatives of the Bradley Mining Company [appellee] that construction of a smelter close to the mining properties *was impracticable* because of the lack of an adequate power supply" and that power first became available thereafter when Idaho Power Co. built a high voltage line (R. 123).

Does Mr. Oberbillig state the facts accurately in this affidavit? Or does he state all the relevant facts? What else would cross-examination elicit were he required to state his story on the witness stand?[19] Moreover, were appellee's representatives speaking to him truthfully or fairly at the time? These are questions of credibility. If Mr. Oberbillig's affidavit is accurate and if appellee's representatives were honestly stating their frame of mind at the time, then *it was not obvious* that appellees were contemplating building a smelter on the property. "When * * * the ascertainment of the facts of a case turns on credibility, a triable issue of facts exists, and the granting of a summary judgment is error." *Colby v. Klune*, 178 F. 2d 872, 873 (2 Cir.); *Arnstein v. Porter*, 154 F. 2d 464 (2 Cir.). A summary judgment may not be used to "withdraw these witnesses from cross-examination * * * their credibility * * * is to be determined, after trial, in the regular manner." *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620, 628.

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19. Cf. opinion of Pope, J. in *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 675:—"His affidavit stated * * *. Cross-examination could be most enlightening, and the cross-examiner would be entitled to ascertain the accuracy of his purported memory * * *."

B. EVIDENCE OF EXTRINSIC CIRCUMSTANCES IS ADMISSIBLE BECAUSE THE FACT THAT TWO COURTS HAVE REACHED OPPOSITE CONCLUSIONS ON THE MEANING OF THE CONTRACT SHOWS THAT IT IS SUSCEPTIBLE OF DIFFERENT MEANINGS AND THEREFORE AMBIGUOUS.

In *Salant v. Fox,* 271 Fed. 449, the Third Circuit said (p. 451):

> "If we had been the first called upon to interpret this contract we should have regarded its language as clear and unambiguous, and have construed it accordingly; *but as the contract has been submitted to another court, it has given rise to three radically different interpretations, we must assume that its language is ambiguous and is susceptible of different meanings.*"

This Court similarly held in *United States v. Dollar,* 196 F.2d 551, where it reversed a summary judgment in a case turning on the meaning of a contract. The same contract had been in issue in *Dollar v. Land* in the District of Columbia, where the District Court construed the contract one way but was reversed by the Court of Appeals, which gave it a different construction. This Court said:

> "*The facts and circumstances before the courts in the case decided in the District of Columbia Circuit were such that reasonable minds not only could, but did, draw from them opposing inferences as to the nature and effect of the transaction.* This being true the case was not one for summary disposition, but for trial and findings. Detsch & Co. v. American Products Co., 9 Cir., 152 F. 2d 473."

In *Davis v. Basalt Rock Co.,* 114 C. A. 2d 300, 250 P. 2d 254 (hearing by California Supreme Court denied) it was said (p 307):

> "We readily admit * * * that both sides frequently stated that in many respects concerning the disputes between them,

> indeed in most, the contract was not ambiguous, but on the contrary clear, certain and not to be misunderstood. *Nevertheless, each side claimed that the contract clearly declared in the way they interpreted it, and just as clearly excluded the meaning contended for by the opposing side. Such a situation is a familiar one. Such a situation also lends support to a determination that a contract capable of stating so clearly such opposite things is sufficiently ambiguous to justify the calling in of all permissible aids for its proper interpretation.*"

In the present case Circuit Judge Healy, sitting in the District Court, held that the contract on its face unambiguously meant what appellee claims. This Court feels otherwise. If the case had to be decided without the aid of extrinsic evidence, this Court's decision would have to control. But the fact that the two courts differ shows that the contract is "sufficiently ambiguous to justify the calling in of all permissible aids for its proper interpretation" and therefore that the case should be tried.

Both intellectual humility and logic lead to this conclusion. The term "ambiguity" in the sense of the rule under consideration merely means that the contract is "susceptible of several significations", *Salant v. Fox,* supra; that it is "capable of being understood in more senses than one", *Whiting Stoker Co. v. Chicago Stoker Corporation,* 171 F. 2d 248, 250, 251 (7 Cir.), or that the "language used is fairly susceptible of two constructions" or "*any* doubt exists", *Barham v. Barham,* 33 Cal. 2d 416, 202 P. 2d 289; or, as stated in *Twin Falls Orchard & Fruit Co. v. Salsbury,* 20 Ida. 110, 117 Pac. 118, 122, "there is room for doubt", or, as stated in *Stone v. Bradshaw,* 64 Ida. 152, 128 P.2d 844, "different minds might well reach different conclusions". California law and Idaho law concur and control. Here the matter is not open to surmise. Different minds *have* reached different conclusions.

C. A REVIEW OF THE CONTRACT AND OF THE AVAILABLE EXTRINSIC EVIDENCE SHOWS THAT THERE SHOULD BE A TRIAL TO RECEIVE THE EVIDENCE.

In the remainder of this petition we point to the questions raised by the text of the writing and to the available extrinsic evidence pertinent to their solution. If the case should be tried and this evidence received, it will, we feel, compel the construction we assert. But the question for this Court is something less: If the trial court after a trial adopts appellee's construction on the basis of the evidence and the witnesses, would the evidence support it? If so, we are entitled to that trial.

1. Smelting Is Not Considered Part of a Miner's Ordinary Treatment Processes, and Values Added by Smelting Are Not Values from the Mining Property.

The basis of this Court's opinion is the holding that where appellee owns the smelter the "net smelter returns" provision of the contract does not apply and that the "net revenue" provision does. It is therefore necessary to examine the "net revenue" clause to see what is the "net revenue" upon which the 5% is to be calculated. The very first question to be asked and answered is: *Revenue from what?*

The Court's opinion answers this question only by a tacit assumption which extrinsic circumstances will show to be impermissible.

The "net revenue" clause of the contract reads as follows (R. 17):

> "By *net revenue,* as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho."

This clause restricts "net revenue" to revenue *"from said properties"* (R. 17). In turn, these key words relate back to the paramount clause quoted on page 5, supra, which provide for a royalty "on all * * * net revenue * * * upon and for all minerals, ores,

metals or values * * * mined, extracted or taken *from the above described mining claims * * * or from any lands, grounds or claims, lodes, or deposits, within the exterior boundaries of said groups of claims*" (R. 15-16). The "properties" are the mining claims and lands, grounds, lodes or deposits within their boundaries.

Suppose appellee were to erect a warehouse on the premises, ship in ore or metal from elsewhere for storage and then reship. Would revenue from that ore or metal be revenue from ores or metals "shipped from the properties"? Patently not.

Or suppose appellee should do custom smelting at the Yellow Pine smelter, i.e., suppose it should buy concentrates produced by others from mines elsewhere and smelt them. Would the proceeds, when appellee resold, be revenue *from the properties* on which it had to pay a royalty? No rational man would say so.

The simple fact is that a pound of metal content in a mass of concentrates is not worth the same as a pound of refined metal as it comes from a smelter. The value of the refined metal is composed of two elements, (1) the value taken from the mining property, and (2) an additional value imparted to it by the smelter in refining it at the cost of labor, power, supplies and investment of capital.

The words "net revenue from the properties" or "values from the properties" cover element No. 1. They cannot include element No. 2.

The fact becomes crystal clear by resort, once again, to extrinsic evidence—and judicial notice—of *universal industry usage,* which experts will testify to and which has been embodied in the Internal Revenue Code.

Evidence will show that, in the industry, "mining" is understood to include every step from the extraction up through crushing, milling, concentrating and some simple treatment processes. *But*

it has never been deemed to include smelting. The miner commonly owns and operates a mill and concentrator, but he almost never owns or operates the smelter. Crushing and concentrating are "ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product". Smelting is not.

Section 114(b)(4)B of the Internal Revenue Code of 1939[20] specifically defines income from mining property in reference to depreciation and depletion allowances. We quote:

> "As used in this paragraph the term 'gross income from the property' means the gross income from mining. The term 'mining', as used herein shall be considered to include not merely extraction of the ores or minerals from the ground but also *ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products,* and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto. * * * The term 'ordinary treatment processes' as used herein shall include the following: * * * (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (*but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining*), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, *including the furnacing of quicksilver ores.*"

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20. We quote the Internal Revenue Code of 1939 because it was the text in effect when the contract was made. The comparable provisions of the Internal Revenue Code of 1954 are in Section 613(c) and are the same except for paragraphing.

Certainly, we should be entitled to an opportunity to prove by expert evidence the industry distinction which this statute recognizes. To put it succinctly, *there is a difference between mining and metallurgy.* Certain simple metallurgical processes normally applied by mine owners or operators have by long custom come to be treated as part of the mining, but the metallurgical process par excellence—smelting—the very type of metallurgy since the days of Tubal-cain—has not.

Appellant's own pleadings in this case recognize the distinction between revenue or values "from the properties" and additional revenue or value obtained from subsequent metallurgy. In drawing its complaint appellant subconsciously and naturally followed industry usage, and thereby the complaint substantiates appellee's position. Thus the complaint alleges (R. 7):

> "That at the time said agreement was entered into and *thereafter until the commencement of smelter operations* upon the mining properties, as hereinafter alleged, defendant Bradley Mining Co. mined, extracted and took *from said mining properties minerals, ores, metals and values,* consisting among others of gold, silver, antimony, tungsten, sulphur, arsenic and copper."

And in the next paragraph (R. 8):

> "That the greater part of the minerals, ores, metals and values *extracted from the mining properties* are, and since July 1949 have been, processed through said Yellow Pine smelter. After such processing the saleable products are sold * * *."

Note the contrast: Values are "mined", "extracted" or "taken" "from said mining properties". *Thereafter* they are processed through said Yellow Pine smelter.

Under the "net revenue" clause of the agreement appellant is entitled to its 5% of the values derived from "mining"—i.e., "mined" or "extracted" or "taken" "from the properties". But it is

not entitled to 5% on the additional values added by the *metallurgy.* Yet this is what it will receive if it is given 5% on the aggregate value after processing without a deduction of smelting charges.

The distinction becomes obvious by realizing that one person may conduct several distinct businesses. If he does, the revenues he receives from the one should not become confused with the revenues he receives from another.[21]

If value added by the smelter is revenue "from the properties", what element makes it so? Is it the physical location? Or is it ownership? Reflection suffices to show that neither of these elements should be relevant, for each is fortuitous.

Suppose a third party had bought or leased enough of the surface at Yellow Pine to erect the smelter there, did so, and operated it. Surely its smelter charges would be deductible before calculation of the royalty. Thus location is not a relevant factor.

Suppose that, instead of building a smelter at Stibnite, appellee had taken the same $2,000,000 (R. 47, 62), which that smelter cost, and purchased and enlarged the Harshaw smelter at El Segundo, California. No one would contend that appellant would thereby become entitled to the windfall of having its 5% royalty calculated before deducting the smelter charges which the El Segundo smelter made. Thus ownership is not a relevant factor.

If neither ownership nor location is relevant, does a combination of the two alter the fact that smelting is a separate business from

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21. For example, assume that the owner of a cattle ranch sells it to another for a purchase price to consist of a promise to pay 5% of the value of the products of the ranch, which has been raising and selling cattle on the hoof. The price of beef on-the-hoof is 25¢ a pound. Years later the new owner builds a slaughterhouse, invests his capital and pays for labor, in order to sell dressed beef at 50¢ per pound. Or suppose he goes a step further and puts in facilities to operate a dude ranch so as to be able to sell steaks at $5 per pound. Would the transferor now be entitled to obtain 20 times the royalty as before? To say yes would confuse the values of the ranch products with additional values added by other labor and investment in a different kind of enterprise.

mining, and that the values added by smelting are separate from values "from the properties"?

That is answered by yet another example already given. Should appellee enter into the business of custom smelting and buy concentrates from others and smelt them at the Yellow Pine smelter, appellant patently would have no right to any royalty thereon.

Or suppose that appellee should erect on the property a fabricating plant to fabricate the refined metal, after smelting, into objects of commerce for consumer use, or should establish on the premises a factory to fabricate gold into jewelry. Surely no one would claim that appellant would be entitled to 5% of the sales price of the jewelry or other fabricated articles.

Another illustration is furnished by a present case relative to antimony. This metal, as it comes from the smelter, sells commercially for from 30¢ to 40¢ per pound. By extraordinary special post-smelting treatment in a laboratory a high-purity antimony can be made which sells for $5 per pound. It would be a strange contention were appellant to claim 5% of the $5 without deduction for the special treatment.

We submit, then, that ownership and location are not relevant factors.

The test of whether the costs of an operation are deductible before calculating royalty is whether the operation is a normal part of the miner's activities or a different business from mining. And the answer to this is to be found in the extrinsic evidence of the usages, customs, and terminology of the mining industry.

Before leaving this subject certain closely analogous situations may be noted. In *Helvering v. Bankline Oil Co.*, 303 U. S. 362 (reversing this Court), the Supreme Court refused to allow a percentage depletion based on the entire proceeds from the sale of casinghead gasoline. Only part of the value came from the "mining". The rest was from refining.[22]

The words "from the properties" as a qualifier of "net revenue" may not be ignored but must be given meaning. The 1941 contract had been preceded by other royalty contracts between the parties. Evidence will show that a "net revenue" clause first came into the 1939 option agreement (R. 78). But, as the clause there appeared, the words "from the properties" were not present. In that agreement the clause read:

> "By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped less marketing and shipping costs from Cascade, Idaho". (R. 91)

The addition in the 1941 contract of the words "from the properties" was a *limiting* term. The extrinsic evidence ought to be admissible to show its significance.

2. The Term "Metals Produced from the Properties" Has a Distinct Application That Does Not Extend to the Smelter.

We have been discussing the question of what is revenue "from the properties". Noting the contract definition of "net revenue" as the "amount paid by any purchaser from the sale of * * * metals

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22. *Danciger Oil etc. Co. v. Hamill Drilling Co.*, 171 S.W. 2d 321, 141 Tex. 153, "involved the construction of an oil and gas mining contract". Buying an oil lease interest, Danciger promised to pay a certain percentage "of all the oil, gas, casinghead gas and other minerals produced, saved and marketed * * * from the properties * * * *free and clear of operating expenses* * * *" Then Danciger built an absorption or distillation plant on the premises to separate the gas into its component parts. The issue was whether the royalty was to be paid on the receipts of the products manufactured from the gas, without any deduction for the cost of processing the gas into gasoline and other products. The Supreme Court of Texas, reversing the lower courts, held no, stating (p. 322) that the royalty owner was not entitled to a share of the values added by a manufacturing process.

To the same effect is *Armstrong v. Skelly Oil Co.*, 55 F.2d 1066 (5 Cir.).

or values shipped, taken or produced from said properties", this Court's opinion states (Op. p. 3):

> "We construe the word metals 'produced' as differing from the word metals 'taken' from the mines. Here they were produced by Bradley's smelter."

We gather that this Court's conclusion has been influenced by a rule of construction which we concede is cardinal and on which we rely later in this petition, viz: that a construction ought to be adopted that gives effect to every provision of a contract. Allocating or applying each of the verbs "shipped, taken or produced" to each of the nouns "concentrates, ores, metals or values", the Court reads the contract as providing for royalty on "metals produced" from the property.

But metals "produced by the smelter" are not "produced from the properties."

If there could be no *metals* coming "from the property" unless they were metals coming out of a smelter thereon, a court might be impelled to conclude that the phrase comprised such values, since otherwise it would comprise nothing.

But this reads the phrase out of the matrix of industry realities. Extrinsic evidence will show a variety of ways in which free metal is produced at a mine. The milling process in various mills produces a certain amount of free metal depending on the ore, particularly free gold. Again, one of the commonest methods of obtaining metallic gold is the cyanide process, and extrinsic evidence will show that when the Yellow Pine mill was first put in operation in 1931, it included a cyanidation plant. Extrinsic evidence will further show that cyanidation is not smelting. Just as Section 114(b)(4)(B) of the Internal Revenue Code, quoted above, states, it is one of "the ordinary treatment processes normally applied by mine owners or operators."

Again, we note that appellant's name is "United *Mercury* Mines Company." The property contains or was thought to contain *cinnabar,* i.e., mercury ore. The 1939 option agreement, from which the "net revenue" clause was lifted, specifically included a "Cinnabar Group" of claims (Cf. R. 81). Extrinsic evidence will further show that the word "metals" came into the contracts of the parties in 1939, and at that time the property was thought to be valuable for mercury.

A letter of December 30, 1941, from appellant's counsel to appellee, written in the course of the negotiations, stated:

> "Then in time you may produce something other than concentrates which would be shipped to other than a smelter. If you found a *cinnabar* deposit you would not ordinarily ship your product to a smelter, and I believe we should include the words 'to market' and 'market returns'."

Now cinnabar is neither milled nor smelted. The crushed ore is merely roasted to produce the metal mercury. Evidence will show, as Section 114(b)(4)(B), I.R.C., also states, that the "furnacing of quicksilver ores" is classed as an ordinary treatment process by the miner.

In short, the phrase "metals * * * produced from said properties", can be satisfied without extending these words to a situation to which they do not belong, namely, a production of values by a smelter.

Similarly, the whole "net revenue" clause has a catch-all application to various situations where smelting is not involved. It was in fact applied to unsmelted tungsten concentrates sold to buyers to be used in that form and to sales of tungsten residues. It also would be applied to sales of rock, sand, or gravel.

3. The Worthwine Letters of December 30, 1941.

As noted above, the contract of 1941 was preceded by contracts whereunder the property was that of appellant but was operated by appellee on payment of a royalty. These contracts provided for deducting, before computing the royalty, not only "smelter charges" but a trucking or hauling charge of $2.50 per ton for each ton of concentrates "hauled from the above-described property" (R. 91-92), without regard to the destination. This was changed in the agreement of 1941 so as to limit the $2.50 trucking allowance to a case where the concentrates were hauled or shipped "to Cascade, Idaho" (R. 17). Why this change?

Extrinsic evidence contains a letter dated December 30, 1941 to appellee from Mr. Worthwine who was counsel for appellant, written during the negotiations for this contract, explaining:

> "it might be that in the future a mill or smelter will be erected at Yellow Pine and certainly it is not the intention of the parties that you would be allowed $2.50 a ton haul for ore from Stibnite to Yellow Pine. * * * I am not worried about you or your family contending that you could put a mill or smelter at Yellow Pine or some other point off this particular property and be entitled to $2.50 per ton for transporting the ores from the property to the mill or smelter, but if control of this property should pass from you and your family I do not desire it to be possible for your successors to contend that by building a mill at Yellow Pine or some other place nearby that they would be entitled to a haulage charge of $2.50 per ton for ores."

This letter patently shows that it was contemplated that in the event appellee erected a smelter at Yellow Pine "smelter charges" would still be deductible, but that the $2.50 hauling charge should not be.

Another letter from Mr. Worthwine to appellee refers to

> "the almost *uniform and universal practice of allowing the deduction of freight, assay, and smelting charges* from what we ordinarily consider to be a net royalty."

This letter was written *the same day as the other,* is to be read in conjunction with it, and recognizes the uniform practice in the industry of allowing deduction of smelting charges, in the very context of recognition that appellee might operate its own smelter.

It will be further noted that the contract of 1941 contains a provision relative to trucking costs "should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho". In that event "there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works" (R. 18). The phraseology is noteworthy. It does not merely allow the deduction of a trucking charge; the deduction is to be from the "smelter returns". Yet the party most likely to erect a smelter between the mines and Cascade would be appellee; thus Mr. Worthwine's letter to Mr. Bradley refers to "you or your family" putting a smelter "*at* Yellow Pine or some other point *off* this particular property."

Here, we submit, is a consistent arrangement. If the smelter should be on the property, there would be no deduction of a hauling charge; if the smelter should be between the property and Cascade, a "fair charge for trucking" would be allowed; if the smelter should be beyond Cascade, there would be a $2.50 trucking deduction. But in every case, smelter charges are deductible, regardless of who should own the smelter.

4. Appellant's Construction Writes Words Into the Contract.

At page 6, supra, we saw that the issue of construction is this:

> Is appellant to get the same royalty when the concentrates go through a smelter owned by appellee on the premises as if

> they went through an independently owned smelter, or is it to get a greater royalty merely because the smelter is owned by appellee?

Under appellee's interpretation, the word "smelter" in the phrase "net smelter returns" encompasses *any* smelter. Appellant's construction writes into the phrase the words "independently owned" or "third party owned" so as to make it read "net independently-owned smelter returns". The contract defines "net smelter returns" thus (R. 17):

> "By *net smelter returns,* as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that *the* smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted."

Appellant's construction changes the phrase "amount received from *the* smelter" to the phrase "amount received from *any independently owned smelter*".

This Court's opinion also writes in words, by saying that the "net smelter returns clause" applies only where the returns are received from "a third party's" smelter (Op. p. 3). Those words are not in the contract.

In *Union Oil Co. v. Union Sugar Co.,* 31 Cal. 2d 300, 188 P. 2d 470, the trial court had held that on its face a contract calling for certain action should be read as if it contained the words "in any event". The Supreme Court of California reversed, observing (p. 306):

> "Once something has to be read into a contract to make it clear, it can hardly be said to be susceptible of only one interpretation. It would have been error for the trial court to read something into the contract by straining 'to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists.' (*Body-Steffner Co. v. Flotill Products,* 63 C. A. 2d 555, 562 [147 P. 2d 84].)"

5. Appellant's Construction Makes the Entire "Net Smelter Return" Clause a Superfluity.

This Court's opinion holds that no smelter charges are deductible where appellee owns the smelter because it is the "net revenue" clause that then applies. The reasoning behind this holding is that where appellee owns the smelter it "receives" nothing from the smelter and so there are no "smelter returns".

But this construction reads the "net smelter" provision completely out of the contract as wholly superfluous.

Extracted from their matrix in industry usage, the phrases "smelter charges" and "net smelter returns" connote that a commercial or independently-owned smelter engages in the business of performing a service job for which it charges a toll or fee, returning to the owner of the concentrates the refined material less the charge for the service of refining. But extrinsic evidence will show that independent smelters hardly ever do charge a fee for performance of a service and that, instead, they buy the concentrates and pay a purchase price.[23]

Thus what is "received" from an independent smelter is simply *revenue.* If the "net smelter returns" clause is confined to independently owned smelters, that clause becomes a superfluity, for it adds nothing whatever to the "net revenue" clause, which we quoted at page 26 above. Exactly the same revenue would be paid to appellant under the "net revenue" clause on concentrates going to an independent smelter as under the "net smelter returns" clause. But it is elementary, in every common law jurisdiction, that

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practical, each clause

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23. This fact actually appears in the affidavit of Mr. Oberbillig, appellant's president, when he states (R. 132, 133) that "the common and ordinary meaning of such words [net smelter returns] [is] the net amount paid by a smelter as the purchaser of ores and concentrates".

helping to interpret the other." (Cal. Civ. Code, Sec. 1641. Cf. Restatement of Contracts, Sec. 235 (c)).[24]

In order, then, for the "net smelter returns" clause to have any office or function, it must apply to a smelter owned by appellee.

6. Appellant's Construction Writes Out of the Net Smelter Return Clause a Significant Part.

Let us quote again the "net smelter return" clause. It reads (R. 17):

> "By *net smelter returns,* as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, *it being understood that the smelter will deduct its normal smelting charges* and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted."

Note the words, "it being understood that the smelter will deduct its normal smelting charges". If the "net smelter returns" clause applies only when the smelting is done by an independent smelter, these words are superfluous, for the amount received from the smelter is what it will pay. *Its* "deductions" would not be in the control of the parties.

Extrinsic evidence will show how these words got into the contract.[25] In 1939 the parties entered into an option agreement, in

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24. Accord: 3 Williston on Contracts 1779 (Rev. ed. 1936); 3 Corbin on Contracts 100 (1951); *Bratton v. Morris,* 54 Ida. 743, 37 P.2d 1097, 1100 (1934); *Molyneux v. Twin Falls Canal Co.,* 54 Ida. 619, 35 P.2d 651, 653 (1934); *Caldwell State Bank v. First Nat. Bank,* 49 Ida. 110, 286 Pac. 360, 362 (1930).

25. "A contract may be explained by reference to the circumstances under which it was made * * *" (Cal. Civil Code, Sec. 1647). "For the proper construction of an instrument, the circumstances under which it was made * * * may also be shown, so that the judge be placed in the position of those whose language he is to interpret." (Cal. Code of Civil Procedure, Sec. 1860). These provisions are not merely California law, they are law generally. Restatement of the Law of Contracts, Sec. 235(d); 3 Williston on Contracts 1780 (rev. ed. 1936); 3 Corbin on Contracts 17 (1951); *Rudeen v. Howell,* 71 Idaho 365, 283 P.2d 587, 589 (1955) and cases cited therein.

which the "net smelter clause" first appeared (R. 78 at 91). At that time the parties contemplated the possibility of a smelter on the property, for the same option agreement, in the very sentence preceding this definition of net smelter returns, refers to the possibility of "local reduction of the concentrates." (R. 91). Early drafts contained the clause "it being understood that the smelter will deduct its smelting charges". This addition *is appropriate to the situation of a smelter operated by appellee.* And this is underscored by the fact that the early drafts did not contain the limiting adjective "normal" before "smelter charges". The final insertion of the word "normal" was to protect appellant against appellee charging for smelting more than independent smelters were accustomed to do in the industry.

7. In Industry Usage "Net Smelter Returns Received" Means Returns "Realized".

Appellant's principal argument in this case is that the "net smelter clause" refers to "net smelter returns *received*", that the word "received" connotes payment by a third party, and therefore that the "net smelter" clause is not applicable to a smelter owned by appellee. And that argument was persuasive to the Court.

We therefore note a contrast on the face of the writing that calls for explanation by extrinsic circumstances. The three definitions, of "net smelter returns", "net revenue" and "net mint returns", appear consecutively (R. 17). Net revenue is defined as "the amount *paid by any purchaser*"; net mint returns are defined as "the amount *paid*" by a mint. Thus where the parties meant to refer to a purchase price *paid* by a third party, they knew how to say so explicitly. Yet, in the same context, in speaking of smelter returns, they do not say "amount paid by the smelter". They say "amount *received* from the smelter." The deliberate change in language must have a significance.

The explanation of the significance here, as elsewhere, lies in industry usage.

As long ago as 1898 and 1903, in Colorado, the heart of the Mining West, it was held that "smelter returns" in a royalty contract mean "return from the ore, less the smelting charges." *Frank v. Bauer,* 19 Colo. App. 445, 75 Pac. 930, 932.[26] And in *Maloney v. Love,* 11 Colo. App. 288, 52 Pac. 1029, the court said of the words "net proceeds from all smelter * * * and mill returns"

> "every miner and every person familiar with transactions involving leases of mining property knows exactly what they mean. They mean that * * * charges for treatment are to come out of the gross mill or smelter values, and what is left is net proceeds."

In short, evidence of industry usage will show that "net smelter returns received" do not imply payment by a third party. Experts will testify that these words are used in the industry to signify the net *realization* after smelting, whether by way of cash paid or credit given.

The affidavit of Harold Lee touches on such usage in intracompany smelting (R. 110-112). There may be some conflict between this affidavit and that of Mr. Oberling (see footnote 23, supra). That conflict can only be resolved by placing both on the witness stand, subject to cross-examination and comparison with other witnesses.

8. Affirmative Allegations and Practical Construction by the Parties' Conduct; the Boise Purification Plant.

In defendant-appellee's answer to the complaint, it made certain positive averments of fact (R. 48, 49), including this:

> "that for a long period of time after the execution of the agreement of December 31, 1941 and for a long period of time after the construction and commencement of operations of the Yellow Pine Smelter the plaintiff construed said agreement to entitle it to receive a royalty of five per cent upon net

26. The court there commented that evidence of "any custom defining the meaning of these words" would be admissible.

> smelter returns irrespective of the ownership or location of the smelter receiving the concentrates, thus construing and interpreting the language of the agreement in the same manner as the same is now and at all times has been, construed and interpreted by this defendant, and during said period plaintiff accepted without reservation royalty payments so computed * * *."

If this averment is true, it is a potent, if not controlling, factor in construing the contract. No rule of interpretation is better settled than that the construction placed on a contract by the acts and conduct of the parties is well nigh binding. *Barham v. Barham,* 33 Cal. 2d 416, 202 P. 2d 289; *Tanner v. Title Ins. & Trust Co.,* 20 Cal. 2d 814, 823; 129 P. 2d 383; *Cottle v. Oregon Mut. Life Ins. Co.,* 60 Ida. 628, 94 P.2d 1079; Williston on Contracts, Secs. 623, 629. Thus in *Frank v. Bauer,* 19 Colo. App. 445, 75 Pac. 930, the court said (p. 932):

> "* * * the parties themselves construed the contract in this respect by paying royalty upon the value of the ore at the smelter, *less smelting charges.* They thus defined the meaning of the words 'mint or smelter returns,' and this interpretation, in the absence of other evidence, we are justified in accepting."

Additionally, extrinsic evidence can be offered to show that appellee built a "purification plant" in Boise and in 1944-45 processed tungsten concentrates from the properties through this plant in order to make them marketable. Prior to building this plant appellee sent its tungsten concentrates to Vitro Manufacturing Co. and Wah Chang Trading Corporation, which did not buy but purified them, charging a fee for the service. When appellee then sold the product, it paid the 5% royalty on the proceeds *after first deducting the charges of Vitro and Wah Chang.* Its accounting to appellant showed the facts and the deductions were accepted as proper.

Thereafter appellee built the Boise Purification Plant to do the job formerly done by Vitro and Wah Chang. The type of treatment used in the Boise Purification Plant embodied leaching, flotation and roasting, and thus stood midway between the ordinary treatment processes normally applied by mine operators and smelting processes. Appellee deducted its costs of operating this plant before calculating appellant's royalty on the proceeds, just as formerly it had deducted the charges of Vitro and Wah Chang. Its accounting to appellant showed exactly what it did, and appellant accepted the practice and accounting as proper. This demonstrates that appellant did not consider itself entitled to royalty on that part of the "amount paid by any purchaser" which was due to added value created by appellee's activity and expenditures not within the ordinary treatment processes of miners. *A fortiori,* deduction of smelting charges at a Bradley-operated smelter is proper.

The significance of the fact cannot be doubted. Mr. Oberbillig, appellant's president, recognized the parallel, for he referred to the Boise Purification Plant in his affidavit and first averred (R. 122) that

> "Bradley sold the tungsten W03 to purchasers and paid the United Mercury Mines Company its royalty on the basis of five per cent of the amount received from the purchasers *with no charge or reduction in the royalty on account of the operation of the reconditioning plant at Boise, Idaho. The operation performed by the reconditioning plant at Boise served in part essentially one of the same processes in reducing tungsten concentrates to tungsten W03 that the Yellow Pine smelter serves in reducing antimony concentrates to antimony metal or antimony oxides."*

Mr. Oberbillig's statement that no deductions were made was erroneous, and he withdrew it by stipulation on the ground that it was inaccurate (R. 133, 134).

Can appellee properly be denied the opportunity to try to prove its verified allegation and the facts about the Boise Purification Plant? In the words of *Hycon Manufacturing Company v. H. Koch & Son,* 219 F. 2d 353, 355 (9 Cir.), "No comment is required". A summary construction of the contract against appellee, denying it this opportunity, is, we submit, simply unthinkable.

9. Other Extrinsic Circumstances:—Purpose of the Contract and Credibility.

Other relevant extrinsic circumstances can be related, but we refrain so as not to convert this petition into a trial brief. We content ourselves with sketching two.

Extrinsic evidence will show that the 1939 contract provided for a higher percentage as royalties than did the 1941 contract (see R. 90); that the properties contained low grade ores which appellee could not afford to mine and beneficiate at those higher royalty rates; that appellant was willing to accept the lower rates because the higher would produce either less actual royalty or none at all since they would preclude operations, whereas the lower rate would give appellant an increased return because of increased tonnage; and that appellee's reason for building the smelter was that the available ore had become so low grade that it would otherwise be uneconomic to operate.

Under appellant's construction that its present royalty is to be calculated before deducting the smelting charges, appellee will have to pay nearly double the royalty it would pay if the concentrates went through an independent smelter. With this added burden the time will be longer delayed before appellee can afford to renew operations, and after renewal the periods of operation will be of shorter interval. Low grade ores will cease to be mineral reserves, for in the usage of the mining industry a reserve is only a deposit that can economically be worked.

A consequence of appellant's construction of the contract is thus to defeat or tend to defeat a major purpose of the 1941 contract,

contrary to the principle that a contract should be construed so as to effectuate, not defeat, its purpose (Cf. Cal. Civil Code, Sec. 1636, 1643, 1648). Appellant can afford to insist on its interpretation only because appellee is already mired in its investment of $2,000,000 and may have to operate the smelter to cut its losses.

What has just been said brings up another item of *credibility.* Mr. Oberbillig's affidavit asserts that he did not know until 1949, after the smelter was built, that appellee construed the contract as permitting deduction of the smelter charges (R. 124). But the contrary is perfectly demonstrable. We have and can place in evidence letters from Bradley to Oberbillig written in 1948 before the smelter was built, in which appellee's understanding of the contract is plainly stated. Indeed, Mr. Oberbillig's affidavit elsewhere quotes from such a letter written in March 1948 (R. 131, 132). Either credibility is involved or cross-examination is needed to explain the inconsistency of Mr. Oberbillig's assertions and the fact that he wrote no reply to appellee challenging appellee's construction but silently permitted the smelter to be constructed.

CONCLUSION

Some of the items of extrinsic evidence mentioned above are in the present record (although only by affidavit and incompletely). Some are not, but those not in the record are absent because there has been no trial. The essence of this petition for rehearing and motion for modification is that appellee is entitled to a trial in order to get this evidence into the record in the manner provided by law and guaranteed by *Fountain v. Filson,* 336 U. S. 681.

Appellant will not be injured by the requested modification of this Court's decision, because

1. A trial of the issue of contract interpretation is all that appellant sought by its appeal.

2. If, after trial, the District Court should find from adequate evidence that the actual intent of the parties was as appellee contends, an injustice will have been avoided. If the evidence should support appellant, it will then prevail.

Whatever construction is finally placed on the contract by final judgment in this action will grip it for nearly a millenium to come.

We respectfully submit that the petition or motion should be granted.

Dated: San Francisco, California, March 19, 1956.

Moses Lasky
Wm. E. Colby
John Parks Davis
Attorneys for Appellee.

Brobeck, Phleger & Harrison
Of Counsel

We hereby certify that in our judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Moses Lasky
Wm. E. Colby
John Parks Davis

(Motion for Modification attached)

No. 14,705

In the

United States Court of Appeals

For the Ninth Circuit

United Mercury Mines Company,
a corporation,
Appellant,

vs.

Bradley Mining Company,
a corporation,
Appellee.

Motion for Modification of Decision and Judgment Under Fountain v. Filson, 336 U.S. 681.

Appellee Bradley Mining Company hereby moves the court for an order modifying the decision and judgment rendered herein on February 8, 1956, in the following respects:

1. By limiting the judgment to a simple reversal of the judgment of dismissal of the District Court with a remand for a trial on all relevant issues, including the issue of interpretation and construction of the contract between appellant and appellee dated December 31, 1941, copy of which is attached to the complaint herein as Exhibit 1, at which trial the parties shall be permitted to offer all pertinent extrinsic evidence in aid of interpretation of the contract, and to that end

2. Striking the last sentence of the decision and judgment of February 8, 1956 reading:

> "The judgment is reversed and the district court ordered to entertain United's complaint in the light of our construction of the contract"

and substituting therefor either the following:

> "The judgment is reversed and remanded to the district court for a trial on all relevant issues, including the issue of interpretation and construction of the contract, copy of which is attached to the complaint herein as Exhibit 1, at which trial the parties shall be permitted to offer all pertinent extrinsic evidence in aid of interpretation of the contract"

or other language appropriate to the purpose stated in paragraph 1 above, and

3. Striking those portions of the opinion and judgment inconsistent with said purpose, including the portions reading thus:

> "It is equally obvious that, if Bradley built the smelter, the above quoted contract's clause for 'net smelter returns' which are to be 'received from' a third party's smelter does not apply. We must look elsewhere in the contract for a provision creating a basis for royalties, since it is not conceivable that the parties intended that United would be deprived of all royalties by the simple device of Bradley building its own smelter near its mines.
>
> "We hold that this situation is provided for by its language respecting metals produced from the mines by Bradley's smelter. 'Bradley * * * does hereby * * * agree to pay to United * * * a royalty of five per cent (5%) on all * * * net revenue * * * as defined herein.' The definition is 'By net revenues, as used herein, is meant the amount paid by any purchaser from the sale of * * * metals or values *shipped,* taken or *produced* from said properties, less marketing and shipping costs from Cascade, Idaho.' (Emphasis added.)
>
> "We construe the word metals 'produced' as differing from the word metals 'taken' from the mines. Here they were produced by Bradley's smelter. We do not agree with the district court's holding that 'the contract does not reflect any precise basis for computing the royalty.' "

The motion is based on the records of this Court and is made on the ground that

(a) this Court lacks power in the premises to place a controlling construction on said contract, and
(b) that it is erroneous for the Court to do so,

since by doing so it directs a summary judgment for appellant on the issue of interpretation whereas a genuine issue of fact as to said interpretation exists on which appellee is entitled to a full trial. Appellee further adopts and incorporates herein as grounds of this motion all the grounds stated in the petition for rehearing to which this motion is attached.

Dated: March 19, 1956.

MOSES LASKY
WM. E. COLBY
JOHN PARKS DAVIS
Attorneys for Appellee.

BROBECK, PHLEGER & HARRISON
Of Counsel